Opinion of the United States District Court
Dated May 9, 1969

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

No. 68 CR. 927

UNITED STATES OF AMERICA

v.

JUAN PEDRO FARINAS,

Defendant.

ROBERT M. MORGENTHAU, U. S. Atty., Southern Dist. of New York, *for plaintiff*, Charles B. Updike, New York City, of counsel.

SANFORD M. KATZ, New York City, *for defendant*.

MEMORANDUM

TENNEY, *District Judge*:

Defendant moves herein to dismiss the indictment charging him with a violation of the Selective Service Act of 1967, for a bill of particulars, and for discovery and inspection. Inasmuch as it is the opinion of this Court that the indictment lodged herein is too vague in its language to enable the defendant to properly prepare his defense, defendant's other motions need not be considered at this time.

The indictment in this case provides:

"The Grand Jury charges:

On or about the 13th day of August, 1968, and up to and including the date of the filing of this indictment, in the Southern District of New York, JUAN PEDRO FARINAS, the defendant, unlawfully and knowingly did fail, neglect and refuse to perform a duty required of him under and in execution of the Military Selective Service Act of 1967, Title 50 Appendix, United States Code, Section 451 et seq. and the rules, regulations and directives made pursuant thereto, in that he, being a registrant, to whom an Order to Report for Induction had been mailed by his Selective Service System Local Board, unlawfully and knowingly did fail, neglect and refuse to obey the orders of representatives of the Armed Forces of the United States, while at the place where his induction was to be accomplished. (Title 50 Appendix, United States Code, Section 462(a); 32 C.F.R. 1632.14)" [1]

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[1] Title 50 App., United States Code, Section 462(a), provides in pertinent part:

"Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions of this title [sections 451, 453, 454, 455, 456 and 458-471 of this Appendix], or the rules or regulations made or directions given thereunder * * * who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title * * * shall, upon conviction * * * be punished by imprisonment for not more than five years or a fine of not more that $10,000, or by both such fine and imprisonment * * *."

32 C.F.R. § 1632.14 provides in pertinent part:

"(b) Upon reporting for induction, it shall be the duty of the registrant * * * (4) to obey the orders of the representatives of the Armed Forces while at the place where his induction will be accomplished * * *."

In Lowenburg v. United States, 156 F.2d 22 (10th Cir. 1946), the defendant, classified IV-E under the Selective Service Act, was assigned to work of national importance at various camps, including the Civilian Public Service Camp at Mancos, Colorado, and allegedly failed to perform his duties satisfactorily. The court held that an indictment which merely charged a defendant with refusing to perform "the duties assigned to him by the director of said Civilian Public Service Camp No. 111, in the Town of Mancos, in the County of Montezuma, in the State of Colorado", without apprising the defendant of the specific duties which he is charged with having failed to perform, did not meet the minimum requirements of good pleading and was, therefore, legally insufficient to charge the accused with the commission of a public offense.

Inasmuch as the fundamental purpose underlying Rule 7(c) of the Federal Rules of Criminal Procedure[2] is to inform a defendant of the nature of the charges leveled against him and, therefore, of what he must be prepared to meet, Wright, Federal Practice and Procedure § 125 at 232-33 (1969), it is the opinion of this Court that the indictment in this case serves that end no better than that which was before the court in *Lowenburg, supra.* Although the indictment herein goes one step further by charging that the defendant failed in his duties *by refusing to obey certain orders,* its failure to specify the nature of the orders allegedly disobeyed renders that step a negligible one in light of the basic function of an indictment.

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[2] Fed.R.Crim.P. 7(c) provides in pertinent part:

"The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. * * *"

It is well established that the purpose of an indictment is to fully apprise the defendant of the crime with which he is charged so that he may properly prepare his defense. United States v. Simmons, 96 U.S. 360, 362, 24 L.Ed. 819 (1877). To this end, it has been held that although an indictment may be drafted in the language of the statute so long as the language employed contains all the essential elements of the offense charged, United States v. Spada, 331 F.2d 995 (2d Cir.), *cert. denied*, 379 U.S. 865, 85 S.Ct. 130, 13 L.Ed.2d 67 (1964); United States v. Cimino, 321 F.2d 509, 512 (2d Cir.), *cert. denied* sub nom. D'Ercole v. United States, 375 U.S. 967, 84 S.Ct. 486, 11 L.Ed.2d 416 (1963), where the statutory definition "* * * includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species,—it must descend to the particulars. * * *" United States v. Cruikshank, 92 U.S. 542, 558, 23 L.Ed 588 (1875); United States v. Hess, 124 U.S. 483, 488, 8 S.Ct. 571, 31 L.Ed. 516 (1888); United States v. Guterma, 189 F.Supp. 265, 270-271 (S.D.N.Y. 1960). In other words, if a statute upon which an indictment is lodged fails, by virtue of its general terminology, to sufficiently apprise the defendant of what he needs to know in order to commence the preparation of a defense, the indictment cannot suffer from the same defect, but must specifically set forth the facts which constitute the core of the alleged offense.

The indictment in this case, which charges the accused with failing to obey orders of certain representatives of the Armed Forces of the United States while the accused was present at the place where his induction was to be accomplished, not only could conceivably fail to state

a crime (see discussion below) but, most importantly, falls below the minimum standard of specificity in respect of the requirement of reasonable notice. United States v. Hess, *supra;* United States v. Cruikshank, *supra;* Lowenberg v. United States, *supra;* United States v. Turner, 274 F.Supp. 412, 417 (E.D.Tenn. 1967); United States v. Simplot, 192 F.Supp. 734, 737 (D.Utah 1961); United States v. Devine's Milk Laboratories, Inc., 179 F.Supp. 799, 800-801 (D.Mass.1960); United States v. Apex Distrib. Co., 148 F. Supp. 365, 372 (D.R.I.1957).

Further, where an indictment condemns an act belonging to a species of conduct, which species includes other acts not amounting to indictable offenses, it is not sufficient that the indictment merely identifies the species in general but, rather, it must particularize the act or acts which, it is alleged, constitute the offense charged, Mims v. United States, 332 F.2d 944, 946 (10th Cir.), *cert. denied,* 379 U.S. 888, 85 S.Ct. 158, 13 L.Ed.2d 92 (1964), so that the court can be assured that the indictment charges conduct which is, in fact, prohibited by law. Russell v. United States, 369 U.S. 749, 768 n. 15, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962); United States v. Cruikshank, *supra* at 558-559 of 92 U.S.; United States v. Lamont, 18 F.R.D. 27, 31 (S.D.N.Y. 1955), *affirmed,* 236 F.2d 312 (2d Cir. 1956).

In the present case, inasmuch as this Court can conceive of certain orders, unrelated to the induction process, which a civilian would not under law be necessarily required to follow, it would seem fundamental that the indictment recite the particular order or orders which the accused is alleged to have disobeyed.

Although the Government consents to furnish the accused, in a bill of particulars, the specific orders to which

the indictment refers, this Court follows the proposition that a bill of particulars cannot save an invalid indictment. Russell v. United States, *supra* 369 U.S. at 770, 82 S.Ct. 1038; United States v. Seeger, 303 F.2d 478, 484 (2d Cir. 1962); United States v. Lamont, 236 F.2d 312, 315 (2d Cir. 1956). To do otherwise would invite the Government to usurp the functions of the Grand Jury.

Needless to say, the Government's contention that inasmuch as the defendant was present at the induction center when the incident took place, " * * * no one knows better than he what went on. * * * ", requires no discussion.

For the above-stated reasons, and with a view towards assuring that indictments remain effective for their intended purpose, the within motion by defendant to dismiss the indictment is granted.

So ordered.

Second Indictment

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Filed May 29, 1969

INDICTMENT

69 Cr. 481

UNITED STATES OF AMERICA

—v—

JUAN PEDRO FARINAS,

Defendant.

The Grand Jury charges:

On or about the 13th day of August, 1968, in the Southern District of New York, JUAN PEDRO FARINAS, the defendant, unlawfully and knowingly did fail, neglect and refuse to perform duties required of him under and in execution of the Military Selective Service Act of 1967, Title 50 Appendix, United States Code, Section 451 *et seq.*, and the rules, regulations and directions made pursuant thereto, in that he, being a registrant, to whom an Order to Report for Induction had been mailed by his Selective Service System Local Board, unlawfully and knowingly did fail, neglect and refuse to obey the orders of representatives of the Armed Forces of the United States, while at the place where his induction was to be accomplished, as hereinafter set forth:

COUNT ONE

Defendant, JUAN PEDRO FARINAS, failed to cease and desist distributing leaflets to other registrants when ordered to do so.

(Title 50 Appendix, United States Code, Section 462(a); 32 C.F.R. 1632.14)

COUNT TWO

Defendant, JUAN PEDRO FARINAS, failed to cease and desist making speeches to other registrants when ordered to do so.

(Title 50 Appendix, United States Code, Section 462(a); 32 C.F.R. 1632.14)

COUNT THREE

Defendant, JUAN PEDRO FARINAS, failed to cease and desist engaging in boisterous and unruly behavior when ordered to do so.

(Title 50 Appendix, United States Code, Section 462(a); 32 C.F.R. 1632.14)

COUNT FOUR

The Grand Jury further charges:

On or about the 13th day of August, 1968, and up to and including the date of the filing of this indictment, in the Southern District of New York, JUAN PEDRO FARINAS, the defendant, unlawfully and knowingly did fail, neglect and refuse to perform a duty required of him under and in execution of the Military Selective Service Act of 1967, Title 50 Appendix, United States Code, Section 451 *et seq.*,

and the rules, regulations and directions made pursuant thereto, in that he, being a registrant, to whom an Order to Report for Induction had been mailed by his Selective Service System Local Board, unlawfully and knowingly did fail, neglect and refuse to report for and submit to induction into the Armed Forces of the United States.

(Title 50 Appendix, United States Code, Section 462(a); 32 C.F.R. 1632.14)

COUNT FIVE

On or about the 13th day of August, 1968, in the Southern District of New York, JUAN PEDRO FARINAS, the defendant, unlawfully, wilfully and knowingly, by force and violence and otherwise hindered and interfered with the administration of the Military Selective Service Act of 1967, Sections 451 through 471, and the rules and regulations made pursuant thereto in that after being warned that activity disruptive of the processing of other registrants would constitute a felony, JUAN PEDRO FARINAS, the defendant persisted in such activity by making speeches, distributing literature, and engaging in boisterous and unruly behavior.

(Title 50 Appendix, United States Code, Section 462(a); 32 C.F.R. 1632.)

NATHANIAL CRAMER.
Foreman

ROBERT M. MORGENTHAU
Robert M. Morgenthau
United States Attorney

Opinion of the United States District Court
Dated December 30, 1969

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

No. 69 Cr. 481

UNITED STATES OF AMERICA,

v.

JUAN PEDRO FARIAS,

ROBERT M. MORGENTHAU, U.S. Atty., New York City, Southern Dist. of New York, *for the United States*. PETER L. FRIEDMAN, Asst. U. S. Atty., of counsel.

SANFORD M. KATZ, New York City, *for defendant*.

OPINION

COOPER, *District Judge*.

Defendant's various motions seek dismissal of this indictment charging him in five counts with violating the Military Selective Service Act of 1967, discovery and inspection of certain material, and a bill of particulars.

I. *Dismissal of the Indictment*

On November 13, 1968, the Grand Jury filed indictment No. 68 Cr. 927 charging defendant in one count with failure to perform duties required of him under the Military

Selective Service Act of 1967, 50 U.S.C. App. § 462(a), and the rules and regulations promulgated thereunder, in that he, as a registrant ordered to report for induction, knowingly failed to obey the orders of Armed Forces representatives while at the place of induction. That indictment was subsequently dismissed by Judge Tenney as being too vague to permit defendant to adequately prepare a defense because the "orders of certain representatives of the Armed Forces of the United States" allegedly disobeyed were not specified or recited therein. United States v. Farinas, 290 F.Supp. 852 (S.D.N.Y. 1968).

Defendant's case was then presented anew to the Grand Jury resulting in the filing on May 29, 1968 of the instant five-count indictment, 68 Cr. 481, which charges that defendant:

> (a) knowingly failed, neglected and refused to obey the orders of representatives of the Armed Forces of the United States while at the place of induction, to wit, he failed when ordered to do so to cease and desist distributing leaflets to other registrants, making speeches to other registrants, and engaging in boisterous and unruly behavior (Counts 1-3);
>
> (b) knowingly failed, neglected and refused to report for and submit to induction into the Armed Forces of the United States (Count 4);
>
> (c) knowingly, by force and violence and otherwise, hindered and interfered with the administration of the Military Selective Service Act of 1967 in that after being warned that activity disruptive of the processing of other registrants would constitute a felony, he persisted in such activity by making speeches, distribut-

ing literature and engaging in boisterous and unruly behavior (Count 5). See 50 U.S.C. App. § 462(a); 32 C.F.R. § 1632.14.

A. *All five counts*

1. vindictiveness

Defendant first moves for dismissal of the indictment on the ground that the return of a five-count indictment following dismissal of the prior one-count indictment "constitutes a form of vindictiveness against the defendant in violation of the due process provisions of the Fifth Amendment."

We have no evidence of vindictiveness here. Indeed, defendant has obtained that which he sought: specification and particularization of the offenses charged. In any event defendant has not been prejudiced by the filing of a five-count indictment. The authorities relied upon by defendant, all involving a defendant who had been treated more severely following the assertion of certain constitutional rights, are inapposite. See North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969) (more severe sentence on retrial); United States v. Jackson, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968) (exposure to death penalty if trial by jury); Colon v. Hendry, 408 F.2d 864 (5th Cir. 1969) (charging a felony on retrial in place of a misdemeanor). Here the maximum penalty to which defendant could be subjected if convicted has not been increased by the additional counts since all offenses charged arose out of a single incident. See United States v. Ketchum, 320 F.2d 3, 8 (2d Cir. 1963).

2. multiplicity

His claim that the indictment must be dismissed on grounds of multiplicity, or that the Government must at this stage elect among counts, is denied. See United States v. Ketchum, supra at 7-8; United States v. Leibowitz, 420 F.2d 39 (2d Cir., Dec. 19, 1969). We cannot find that the alleged multiplicity "appears upon the face of the indictment so clearly that it is manifest that the Government cannot, as a matter of law, prove separate and distinct offenses." United States v. Birrell, 266 F.Supp. 539, 544 (S.D.N.Y.1967). Each provision allegedly violated and each count charged herein involve or may involve proof of elements in addition to or different from the others. Compare Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932).

B. *Counts 1-3*

1. Constitutionality of the Statute

a. delegation of legislative power

Defendant first seeks dismissal of Counts 1-3 on the ground that 50 U.S.C. App. § 462(a) constitutes an impermissibly broad delegation of legislative power by the Congress. This subsection provides, in pertinent part that it shall be a criminal offense to knowingly fail to perform any duty as established by the rules and regulations promulgated under the authority of the President "to prescribe the necessary rules and regulations to carry out the provisions of this title." 50 U.S.C. App. § 462(a); 50 U.S.C. App. § 460(b) (1) and (c).

His argument is premised on the alleged absence of any adequate legislative standard for the exercise of this delegation of authority, relying upon Panama Refining Co. v. Ryan, 293 U.S. 388, 55 S.Ct. 241, 79 L.Ed 446 (1935). While concededly broad, we believe the standard supplied by Congress of "necessary * * * to carry out the provisions of this title" to be constitutionally adequate. The regulations which have been adopted directly relate to the fair and efficient functioning of the machinery of the draft system Congress established and "fill in the details" of the clear statutory objective. These rules and regulations have in the main been subjected to many years of administrative refinement and have received the approval implicit in successive Congressional reenactments of this statutory scheme. See generally, Selective Draft Law Cases, [Arver v. United States] 245 U.S. 366, 389, 38 S.Ct. 159, 62 L.Ed. 349 (1918); Seele v. United States, 133 F.2d 1015, 1019 (8th Cir. 1943); United States v. Herling, 120 F.2d 236 (2d Cir. 1941); 1 Davis, Administrative Law §§ 2.01-2.06 (1958). See also, Sayoretti v. Small, 244 F.2d 292, 296-297 (5th Cir. 1957) (power of the President to redelegate his rule-making authority).

b. Vagueness and Overbreadth

In an argument related to the foregoing, defendant alleges that 50 U.S.C. App. § 462(a) is both void for vagueness and overly broad because the duties required to be performed by a registrant are not specified within the statute himself and are "multitudinous" in number. The short answer is that to violate this section there must be a wilful and understanding failure or neglect to obey a known duty. See United States v. Hoffman, 137 F.2d 416, 419 (2d Cir. 1943).

2. Constitutionality of the Regulations

Turning from an attack on the general language of the statute, defendant trains his sights on the specific duties allegedly violated in Counts 1-3.

32 C.F.R. § 1632.14(b) (4) imposes a duty on the registrant at the time he reports for induction "to obey the orders of the representatives of the Armed Forces while at the place where his induction will be accomplished." It is the violation of this duty which is the basis of counts 1, 2 and 3 of this indictment.

a. void for vagueness and overbreadth: delegation of licensing power

Defendant first claims that this regulation is void for vagueness, because it fails to give a defendant "due notice that an act has been made criminal before it is done." Jordan v. De George, 341 U.S. 223, 230, 71 S.Ct. 703, 707, 95 L.Ed. 886 (1951). Second, he argues that in any event Congress never intended that a violation of this particular regulation be made criminal.

There is nothing to support defendant's latter contention—indeed the very language of 50 U.S.C. App. § 462 (a) seems ample refutation. His first argument, however, raises a far more substantial question.

That issue is not really whether the regulation is unduly vague in the manner alleged by defendant—indeed, defendant is only in violation when he knowingly disobeys a specific order he has received—but whether the regulation is overly broad or vague because of its failure to provide any express standard to guide and thereby limit the exercise of the power delegated to Armed Forces representatives.

This regulation requiring that an inductee obey all orders given him by appropriate personnel at an induction center appears at first blush to vest in such military officials untrammeled authority and discretion. From the face of the indictment itself, alleging violation of specific orders directed to defendant to cease making speeches and distributing leaflets, it is clear that this regulation can restrict an inductee's freedom of speech.

To make this observation, however, is not to resolve the issues presented. All limitations on First Amendment rights are not forbidden.[1] The Supreme Court in Cox v. Louisiana, 379 U.S. 536, 555, 85 S.Ct. 453, 465, 13 L.Ed.2d 471 (1965) reaffirmed the principle that "it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed."

Statutes permitting administrative officials discretionary power to "license" speech and speech-related activities have however been held unconstitutional, unless sufficiently limited in scope and purpose. See, *e.g.*, Cantwell v. Connecticut, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213, 128 A.L.R. 1352 (1940); Niemotko v. Maryland, 340 U.S. 268, 71 S.Ct. 325, 95 L.Ed. 267, 280 (1951); Cox v. Louisiana, 379 U.S. 536, 85 S.Ct. 453, 13 L.Ed.2d 471 (1965); Shuttlesworth v. City of Birmingham, 382 U.S. 87, 90-91, 93, 86 S.Ct. 211, 15 L.Ed.2d 176 (1965); Shuttlesworth v. City of Birming-

[1] Justice Black, rejecting the argument that the First Amendment provides an unqualified right to free speech, stated that "[s]uch an argument has as its major unarticulated premise the assumption that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please." Adderley v. Florida, 385 U.S. 39, 47-48, 87 S.Ct. 242, 247, 17 L.Ed.2d 149 (1966).

ham, 394 U.S. 147, 89 S.Ct. 935, 22 L.Ed.2d 162 (1969). These cases involved (1) statutes expressly aimed at speech-related activities, at least as authoritatively construed by the States; (2) discriminatory application of unfettered discretion by local officials; (3) the use of public places, streets, and parks. None of these factors appear from the moving papers to be present in this case.

The power vested in Armed Forces representatives to regulate the exercise of First Amendment rights through the enforcement of 32 C.F.R. § 1632.14(b) (4) is by its very context narrow in time, place and persons affected. Cf. Cox v. New Hampshire, 312 U.S. 569, 576, 61 S.Ct. 762, 85 L.Ed. 1049, 133 A.L.R. 1396 (1941). The regulation only applies to inductees, and then only for that period of time while they are at the induction center.

Nevertheless, the narrow application of this regulation might not by itself validate its delegation of "licensing" power if the discretion vested in those authorized to give orders were unrestrained. The Government has a clear and substantial interest, however, in this regulation: it insures an orderly induction process and provides an essential link in a chain of regulations protecting the functioning of the system provided by Congress in the Selective Service Act for the raising of armies. 32 C.F.R. § 1632.14. We believe it clear from the statutory authorization (50 U.S.C. App. § 460(b) (3)) to prescribe regulations "to carry out the provisions of [the Selective Service Act]" that to be legal and enforceable, orders given pursuant to the authority of 32 C.F.R. § 1632.14(b) (4) must relate to the induction process.

Thus, this delegation of power is not unrestrained and is in sharp contradistinction to arbitrary and unauthorized orders unrelated to induction processing. Cf.

United States v. Spock, 416 F.2d 165, 173 n. 20 (1st Cir. 1969); United States v. Farinas, 299 F.Supp. at 854. We are not presented with any evidence indicating that this regulation has been administered or applied other than in a non-discriminatory manner consistent with this purpose. We conclude therefore that this regulation is not void on its face and that to the extent it represents a delegation of licensing power that discretionary power is restricted to within constitutional bounds.

b. restriction of freedom of speech by these orders

Having found this regulation sufficiently narrow and specific in the discretion it vests in administering officials, we are faced with the question of whether consistent with the Constitution a defendant may ever be held to account for refusing to obey orders to cease making speeches and distributing leaflets at an induction center. It is evident, even if the order given was authorized by the regulation and in fulfillment of the Government's interest (i. e. related to the induction process and directed at the non-speech elements (disruptive effects) of defendant's conduct), that orders given pursuant to this regulation can indirectly restrict an inductee's freedom of speech.

In United States v. O'Brien, 391 U.S. 367, 376, 88 S.Ct. 1673, 1678-1679, 20 L.Ed.2d 672 (1968) the Supreme Court stated:

> "This Court has held that when 'speech' and 'non-speech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."

Accordingly, resolution of this issue requires a balancing of the two conflicting interests (that of the Government and of the individual) to determine which demands the greater protection under the circumstances. See United States v. O'Brien, *supra*.

Certainly the fact that the defendant is charged with making speeches and distributing leaflets in violation of an order directing him to stop such activity does not on its face demand that the balance be struck in defendant's favor. The decision in Callison v. United States, 413 F.2d 133, 136 (9th Cir. 1969)[2] makes this clear:

> "Here the very process of induction was under way and those present were subject to the processing orders of the officers in charge. Even so, appellant was not prevented from engaging in orderly speech nor orderly registration of opposition or grievance. He was precluded only from efforts to incite and solicit others to join with him in an expression of opposition to the very process they were undergoing. The order was thus directly related to a valid and important government purpose; that of maintaining an orderly process of induction—one free from disruption or disruptive potential.

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[2] *Callison* was a prosecution for refusal to submit to induction (not refusal to obey an order). However, the prosecution hinged on the proposition that Callison's refusal to stop soliciting signatures for a petition when ordered to do so, with knowledge that his conduct would make induction impossible and that disobedience would subject him to the consequences of a refusal to submit to induction, constituted refusal to submit to induction. Callison's defense was that the order was an impermissible intrusion on his First Amendment rights.

Further, the rights of others were involved. It must be noted that this was not an open public gathering.*

* Use of a public building for a specific public purpose, such as a jail, a schoolhouse or an induction center, will justify governmental limitation on exercise of First Amendment rights which interfere with that purpose. See Adderley v. Florida, 385 U.S. 39, 87 S.Ct. 242, 17 L.Ed.2d 149 (1966)." [3]

Appellant's conduct was an intrusion upon persons met because their presence was required for a specific purpose. Appellant as an inductee had no greater right than any outsider to intrude himself upon those captively present by harangue upon any subject or solicitation for any purpose. Since any such intrusion is potentially offensive and since the gathering was Government compelled, the Government might decently feel a responsibility to maintain the gathering free from such intrusion.

On balance we find the restriction imposed upon appellant's rights by the order in question to be wholly reasonable.

Defendant is of course not precluded from attempting to show that the orders in this case impermissibly exceeded that which was necessary to further the Government's legitimate interest and that on balance defendant's interest is entitled to the greater protection.[4] By the same

[3] See also, Cox v. Louisiana, 379 U.S. 559, 85 S.Ct. 476, 13 L.Ed.2d 487 (1965).

[4] Defendant's burden in this regard is substantial. Faced with the constitutionality of 50 U.S.C. App. §462(b) (3) prohibiting knowing destruction of a Selective Service registration certificate, the Supreme Court in United States v. O'Brien, *supra* set forth the following criteria for the balancing of interests:

"we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of

token, however, the foregoing establishes that the resolution of such constitutional issues as remain herein with regard to the first three counts (alleged constitutionally protected conduct by defendant and arbitrary and discriminatory application by military officials) must await development of the facts upon trial. See generally, United States v. Branigan, 299 F.Supp. 225, 237 (S.D.N.Y.1969).

C. *Count 5*

Defendant challenges the constitutionality of the statutory duty not to "knowingly hinder or interfere or attempt to do so in any way, by force or violence or otherwise, with the administration of this title or the rules or regulations made pursuant thereto * * *," 50 U.S.C. App. § 462(a), the violation of which is the subject of count 5, on grounds of vagueness and overbreadth. He claims specifically that the 1948 addition of the term "or otherwise" renders the section unconstitutional, particularly if the addition is seen as a Congressional response to the 1943 decision in Bagley v. United States, 136 F.2d 567 (5th Cir. 1943).

For reasons similar to those discussed with regard to the claim immediately preceding, we deny defendant's motion. As stated by the First Circuit in United States v. Spock, 416 F.2d 165, 173 n. 20 (1969) in connection with a similar challenge to another portion of 50 U.S.C. App. § 462(a):

> "We do not believe that section 462(a) is overbroad or vague. A special obligation exists as to federal

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the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of that interest. * * *" 391 U.S. at 377, 88 S.Ct. at 1679.

> statutes to construe them to avoid unconstitutionality, Scales v. United States, [367 U.S. 203, 81 S.Ct. 1469, 6 L.Ed.2d 782 (1961)], so long as such does not result in substantial rewriting. The fact that a seemingly normal criminal statute * * * may in some instances apply to affect freedom of association or freedom of speech does not invalidate the statute. The court's obligation is, rather, to make sure that such a statute does not improperly infringe upon speech in any particular instance. Nor do we believe the indictment failed in its function of informing the defendants of the crime with which they were charged." [citations omitted]

Having found this portion of 50 U.S.C. App. § 462 (a) not to be unconstitutional on its face, we believe it clear that count 5 of this indictment must be upheld against constitutional attack. Defendant is specifically charged in part with "engaging in boisterous and unruly behavior" disruptives of the processing of either registrants so as to hinder or interfere with the administration of the Act. This is sufficient to state an offense. As with counts 1-3, the issue of whether or not defendant's conduct was in fact constitutionally protected by the First Amendment must await development of the facts upon trial.

D. *Count 4*

Defendant alleges that count 4 is duplicitous and must be dismissed because it charges two separate offenses, failure to report for and failure to submit to induction, in a single count. This claim has been specifically rejected by the Eighth Circuit. See United States v. Gutknecht, 406 F.2d 494, 495-496 (1969), cert. granted 394 U.S. 997, 89 S.Ct.

1595, 22 L.Ed.2d 775. From the facts developed to date herein it appears possible that both a failure to submit to induction as ordered (on August 13, 1968) and a failure to report for induction (a continuing duty) may be factually established. See United States v. Meyers, 410 F.2d 693 (2d Cir. 1969) (failure to submit to induction); United States v. Toussie, 410 F.2d 1156, 1158-1159 (2d Cir. 1969) (continuing duty to report for induction). See also, United States v. Trimm, 416 F.2d 1145 (2d Cir., October 9, 1969).

E. *Conclusion*

Accordingly, defendant's motion to dismiss the indictment is denied in all respects.

II *Discovery*

Request 1 is granted. Defendant is entitled to inspect and copy each of his written or recorded statements within the possession or control of the Government. See United States v. Garrett, 305 F.Supp. 267 (S.D.N.Y. Sept. 23, 1969) (defining statements). See also, United States v. Fassler, 46 F.R.D. 43 (S.D.N.Y. 1968).

Request 3 is denied except to the extent granted in Request 1.

Request 4 is granted except that defendant need not be furnished with the race of the members of his Local Board or with the residences of such members, other than whether or not they reside in the county in which the Board has jurisdiction. See United States v. Pierce, 69 Cr. 353 (S.D.N.Y. Nov. 3, 1969); United States v. Branigan, 299 F.Supp. 225, 237 (S.D.N.Y. 1969); Clay v. United States, 397 F.2d 901, 909-911 (5th Cir. 1968).

Request 5 is granted. See United States v. Branigan, *supra*, 299 F.Supp. at 238.

Request 6 is granted to the extent that "the Government shall state whether a quorum was present at each meeting of said [Board] relating to defendant's classification or status." *Id.*

Request 9 is denied. See United States v. Pierce, *supra* (wherein the Government represented by affidavit that the Classification Record (SSS Form 102) is available for examination and inspection at defendant's Local Board).

Request 10 is granted to the extent that the Government shall furnish a copy of the Record of Delinquents (SSS Form 302) as of the date on which defendant was ordered to report for induction. See United States v. Pierce, *supra*.

Requests 2, 7, 8, 11, 12, 13, 14 and 15 are denied.

III *Bill of Particulars*

Items 1, 6 and 11 are granted to the extent consented to by the Government.

Items 3, 8 and 13 are granted except as to subparts (a) thereunder.

Items 4, 9 and 14 are treated as requests made pursuant to Rule 16(b) and granted as such.

Item 5 is granted, if known.

Items 15 and 16 are granted to the extent consented to by the Government.

Item 19 is granted. See United States v. Branigan, *supra*, 299 F.Supp. at 237.

Items 20, 21 and 23 are denied except as granted in Requests 4, 5 and 6 of defendant's motion for discovery.

Item 26 is granted except that the time may be approximate.

Items 2, 7, 10, 12, 17, 18, 22, 24 and 25 are denied.

This shall be considered an order; settlement thereof is unnecessary.

So ordered.

Opinion of the United States District Court
Dated January 28, 1971

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

69 CR. 481 (MP)

MEMORANDUM

UNITED STATES OF AMERICA,

v.

JUAN PEDRO FARINAS,

Defendant.

Appearances:

WHITNEY NORTH SEYMOUR, JR.
United States Attorney for the
Southern District of New York
By: PETER L. TRUEBNER,
Assistant United States Attorney

SANFORD M. KATZ, Esq.
Attorney for Defendant
30 East 42nd Street
New York, N. Y. 10017

MEMORANDUM

POLLACK, *District Judge.*

The defendant, Juan Pedro Farinas, moved orally at the conclusion of the trial herein for a judgment of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Proce-

dure with respect to all counts of which he was convicted, or, in the alternative, for an arrest of judgment pursuant to Rule 34, with respect to those counts.

Prior to trial, the defendant had moved on various grounds, to dismiss the several counts contained in the indictment. This motion was denied by Judge Irving Ben Cooper in an opinion reported at 308 F. Supp. 459 (S.D. N.Y. 1969). That determination reserved to the defendant the right to show that the orders in this case of the representatives of the Armed Forces while at the place where his induction was to be accomplished did not exceed what was necessary to further the Government's legitimate interests and reserved for the trial the issue of whether or not defendant's conduct was in fact constitutionally protected by the First Amendment. In addition to raising these reserved matters, the present motion in effect renews the challenge to the statute and regulation on the grounds urged before Judge Cooper.

The evidence on the trial sufficiently satisfied the essential elements of the crimes charged. The jury could properly find that defendant's conduct was calculated to and in fact resulted in disruption of and hindrance of the induction process and the orderly operations at the Induction Center. There is no constitutional infirmity in the law or regulation and the application thereof was reasonably related to the governmental interest to be conserved. See, in addition to Judge Cooper's opinion, referred to above, *Callison* v. *United States*, 413 F.2d 133, 135-6 (9th Cir. 1969); *United States* v. *Meyers*, 410 F.2d 693, 695-6 (2d Cir. 1969).

Motions denied.

So Ordered.

Milton Pollack
U. S. District Judge

January 28, 1971

Opinion of the United States Court of Appeals
Dated September 28, 1971

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1027—September Term, 1970

(Argued: June 30, 1971 Decided: Sept. 28, 1971.)

Docket No. 71-1257

UNITED STATES OF AMERICA,

Appellee,

—against—

JUAN PEDRO FARINAS,

Appellant.

Before:

MOORE, FEINBERG and MANSFIELD,

Circuit Judges.

Appeal from a judgment of the District Court for the Southern District of New York, *Pollack, Judge,* convicting appellant, after a jury verdict, of failing to obey the orders of Armed Forces representatives at the military facility where he was to be inducted, 50 U.S.C. App. §462(a), 32 C.F.R. §1632.14(b)(4), failing to report for and submit to induction, 50 U.S.C. App. §462(a), 32 C.F.R. §1632.14, and hindering and interfering with the administration of the Military Selective Service Act of 1967 by engaging in activity which disrupted the processing of other registrants, 50 U.S.C. App. §462(a). *Affirmed.*

LAWRENCE G. SAGER, Esq., American Civil Liberties Union, New York, N. Y. (Melvin L. Wulf, Esq., American Civil Liberties Union, and Sanford M. Katz, Esq., New York Civil Liberties Union, New York, N. Y., on the brief), *for Appellant.*

PETER L. TRUEBNER, Assistant United States Attorney, New York, N. Y. (Whitney North Seymour, Jr., United States Attorney for the Southern District of New York, and Ross Sandler, Assistant United States Attorney, New York, N. Y., on the brief), *for Appellee.*

MANSFIELD, *Circuit Judge*:

Appellant Juan Pedro Farinas was indicted by a grand jury in the Southern District of New York in a five-count indictment charging that in three related aspects (Counts 1 through 3) he failed to obey the orders of Armed Forces representatives while at the military installation where he was to be inducted, 50 U.S.C. App. §462(a), 32 C.F.R. §1632.14(b)(4), that he failed to report for and submit to induction into the Armed Forces in violation of 50 U.S.C. App. §462(a), 32 C.F.R. §1632.14, and that he hindered and interfered with the administration of the Military Selective Service Act of 1967 by engaging in activity which disrupted the processing of other registrants, 50 U.S.C. App. §462(a). The first three counts, detailing Farinas' failure to obey orders, were merged into one count at trial, and Farinas was convicted on all counts of the resulting three-count indictment on January 29, 1971,

after a two-day trial before Judge Pollack and a jury. We affirm the conviction.

The evidence adduced at trial, which must upon appeal be viewed in the light most favorable to the Government, with all permissible inferences drawn in its favor, *United States* v. *Dardi*, 330 F.2d 316, 325 (2d Cir.), *cert. denied*, 379 U.S. 845 (1964), showed that Farinas had registered under Selective Service regulations at Local Board No. 7, Manhattan, on May 19, 1965. He received several student deferments before being classified I-A on January 23, 1968. On May 10, 1968, he complied with orders to report for a pre-induction physical examination and as a result of such examination was found qualified for military service. On July 26, 1968, he was mailed a notice ordering him to report for induction on August 13, 1968. On August 7, 1968, he voluntarily visited the office of the 108th United States Army Military Intelligence Group in the Federal Building in New York City and told the officer in charge, Louis J. Travaglino, that he would refuse to serve in the Armed Forces.

On the day appointed for his induction, Farinas participated in an early-morning anti-war demonstration on the part of about 50 persons in front of the Armed Forces Examining and Entrance Station at 39 Whitehall Street in New York City. At about 7:15 A.M. Farinas left the demonstrating group to enter the induction center, carrying a bag containing copies of a handbill expressing his opposition to American military involvement in Vietnam, and to the draft. He was met at the door of the induction center by Captain James Kenny, the chief processing officer at the center, who had observed the demonstration from his post inside the induction center and had concluded that Farinas was its focal point. Sergeant Elias Bereza,

a non-commissioned processing officer, was with Captain Kenny at the door. At Captain Kenny's request, Farinas presented his induction order. Captain Kenny and Sergeant Bereza then escorted Farinas to Sergeant Bereza's office, Room 203. Captain Kenny departed, but Sergeant Bereza remained and advised Farinas that since Farinas' distribution of literature would disrupt processing and possibly lead to violence because of objections by some registrants to having literature forced on them, he would have to surrender his leaflets until he had completed his own processing. After some discussion of Farinas' constitutional rights, Sergeant Bereza yielded and permitted Farinas to retain possession of the literature, with the warning, however, that any abuse of this constitutional right would result in Farinas' being declared an uncooperative registrant, subject to criminal prosecution. The pertinent regulations were read to Farinas and he was asked if he had any questions.[1] He did not.

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[1] AR 601-270 ¶3-31(c)(2), as recodified on March 18, 1969, reads as follows:

"(2) *Uncooperative.* A registrant who refuses to comply with instructions, rules or procedures prescribed for registrant processing, or who refuses to take part in some, or all, of the prescribed processing, testing, or examinations will be informed that his refusal constitutes a felony under the provisions of the Military Selective Service Act of 1967. He will be further informed that convictions of such offense in civil proceedings will subject him to punishment by imprisonment for not more than 5 years, or a fine of not more than $10,000, or both. If he persists in his refusal, the following action will be taken:

(a) If his conduct permits (e.g., if he is not engaging in physical or vocal activity which he will not refrain from doing in order to be reasoned with), he will be requested, but not required, to make a signed statement, dated, in his own handwriting, as follows (insert the phrase or phrases

Farinas then was permitted to enter Room 204, a large room in which registrants were ordered to report initially, fill out forms, read, and pass time at various stages of the induction process. In Room 204, Farinas began distributing his literature and talking to the other registrants. Sergeant Bereza appeared and asked Farinas to refrain from such conduct on the ground that he was interrupting the induction process. He asked Farinas to come with him to his office, which adjoined Room 204. Sergeant Bereza stepped into his office, but Farinas did not follow him; he continued passing out literature and talking to the other registrants. A brief scuffle ensued. After returning to Room 204 and again unsuccessfully ordering Farinas to go to Room 203, Sergeant Bereza summoned Captain Kenny to Room 204.

Kenny, Bereza, and Farinas went into Room 203 and Captain Kenny counseled Farinas pursuant to Army Regulation 601-270, advising him that the distribution of literature and the making of speeches would not be permitted "to the extent that it would interfere with his induction processing and with the processing of the other individuals who were in the building at that time." Farinas was told

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which pertain to him): 'I refuse to comply with instructions, rules or procedures prescribed for registrant processing.' 'I refuse to take part, or all, of the prescribed processing.' 'I refuse to take prescribed tests/examinations.' Such statement should be witnessed by at least two witnesses who will affix their signatures to the statement.

(b) His records will be returned to his local board. He will not be furnished any means of transportation.

(c) Letter of refusal to cooperate will be prepared in quadruplicate. Content and distribution of the letter will be as prescribed in (1)(b) above, except that in lieu of reference to refusal to be inducted, there will be included a description of the facts concerning his refusal to cooperate."

that if he engaged in such disruptive speechmaking and distribution of literature he would be declared an uncooperative registrant subject to criminal prosecution. Farinas replied, "I don't intend to cooperate with you or anybody else in this building." When the counseling was completed, Captain Kenny left the scene to attend to other business.

Ten minutes later Captain Kenny was summoned to Room 206, a room in which Armed Forces personnel and registrants were engaged in filling out and checking various forms. Captain Kenny found Farinas standing in front of a group of registrants and addressing them "in a very loud, boisterous manner, telling them they did not have to cooperate with us, the war was an immoral war, et cetera." Captain Kenny approached Farinas and ordered him to stop, reminding Farinas of the counseling which he had provided only minutes before. Farinas did not stop. Kenny then cleared the room of other persons, whose activities had already been halted by Farinas' conduct, and declared Farinas an uncooperative registrant. Farinas was escorted down the stairs and departed from the building, still making anti-war speeches and distributing leaflets.

Farinas was initially indicted in a one-count indictment on November 15, 1968, for failure to obey certain unspecified orders of the representatives of the Armed Forces. This indictment was dismissed by Judge Tenney upon a motion by Farinas, *United States* v. *Farinas*, 299 F. Supp. 852 (S.D.N.Y. 1969), on the ground that it was overly vague. Farinas was reindicted on May 29, 1969, in the indictment upon which he was tried. His attempts to secure dismissal of the May 29 indictment on some of the

grounds now urged were unsuccessful, *United States* v. *Farinas*, 308 F. Supp. 459 (S.D.N.Y. 1969).

We begin with the argument which counsel for Farinas emphasized during oral argument. It is contended that the regulation which forms the basis for conviction on Count One (the consolidated count) impinges on First Amendment rights and is unconstitutionally vague and overbroad, and that in addition it exceeds the intended and permissible scope of the rule-making authority which Congress delegated. The regulation in question reads as follows: "Upon reporting for induction, it shall be the duty of the registrant . . . (4) to obey the orders of the representatives of the Armed Forces at the place where his induction will be accomplished." 32 C.F.R. §1632.14(b)(4). The regulation is given teeth by 50 U.S.C. App. §462(a), which reads in part as follows:

> "Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions of this title . . . or the rules or regulations made or directions given thereunder . . . who in any manner shall knowingly fail or neglect to perform such duty . . . shall . . . be punished by imprisonment for not more than five years or a fine of not more than $10,000 . . . ."

It is possible that this regulation, viewed wholly apart from the context in which it is applicable, might raise serious constitutional questions, cf. *Shuttlesworth* v. *Birmingham*, 394 U.S. 147 (1969). However, when viewed in context as applied it appears to be reasonably essential to the performance of a basic governmental function, and sufficiently narrow and limited in scope to constitute a permis-

sible restriction upon the exercise of First Amendment rights, which are not absolute, *Cox* v. *Louisiana,* 379 U.S. 536, 559 (1965). A key to our interpretation is to be found in the opening proviso of the regulation itself, *"Upon reporting for induction . . . ."* Thus the regulation by its terms applies only to registrants who have reported to the induction center, and it may not be employed to suppress speech beyond what is required by the exigencies of the induction process. *Callison* v. *United States,* 413 F.2d 133 (9th Cir. 1969). Any restriction on speech imposed to facilitate the induction process, to which the regulation is expressly confined, will be limited both in time (to the day of induction) and place (to the induction area itself). In this case the regulation had no effect—nor could it legitimately have had an effect—upon the anti-war demonstration which went on outside the induction center, and in which Farinas himself participated without restraint before entering the induction center.

The First Amendment is not a license to impede and disrupt the orderly performance of an essential function of government, *United States* v. *O'Brien,* 391 U.S. 367 (1968). The public and private interests at stake must be weighed. For instance, the Government's use of a public building for a valid and specific governmental function entitles it to limit the exercise within that building of First Amendment rights to the extent that such exercise will interfere with the performance of that function. *Adderly* v. *Florida,* 385 U.S. 39 (1966). Here the Government was entitled to an orderly induction process, free from disruption; and other registrants who were there pursuant to orders, being a captive audience without right to leave, were entitled to be free from harassment unconnected with the induction process, *Callison* v. *United States, supra.* In view of the countless

types of specific conduct that could be engaged in to impede the processing of inductees, to require that the regulation be more specific, or that it spell out each such species of conduct, would be unreasonable and would serve no useful purpose. The objective of the regulation is clear: to authorize the issuance of orders that would facilitate the uninterrupted processing of inductees. By its own terms and by reason of its place in a specific regulatory scheme, the regulation must be construed narrowly and constricted in its applicability by limitations as to person, time, and place that will avoid unconstitutionality. *Scales* v. *United States*, 367 U.S. 203 (1961); *United States* v. *Spock*, 416 F.2d 165, 173 n.20 (1st Cir. 1969). We therefore find no constitutional infirmity. *Eisner* v. *Stamford Board of Education*, —— F.2d —— (Dkt. No. 35345, 2d Cir., Mar. 5, 1971).

A jury question was thus presented at trial as to whether the orders which Farinas disobeyed (to cease his disruptive distribution of literature, speech-making, and other boisterous conduct) were related to the orderly conduct of the induction process. There was more than ample evidence from which the jury could infer that the orders were so related.

As for the delegation argument, we think it clear that Congress could constitutionally grant to military personnel at the induction center the power to give necessary orders carrying penalties for disobedience. Registrants are not subject to military jurisdiction and punishment for their refusal to obey lawful orders until they take the oath of induction, *Billings* v. *Truesdell*, 321 U.S. 542 (1944). Nothing in the statute, 50 U.S.C. App. §462(a), suggests that Congress did not intend to authorize the adoption of regulations such as the one here in question, which insures orderliness and freedom from disruption that are essential to the

speedy, efficient processing of inductees. We find such delegation constitutional in light of the limited scope of the regulation, considered above.

A second contention on appeal relates to the admission into evidence of testimony concerning Farinas' conduct in Room 206, where he was finally declared an uncooperative registrant. Two arguments are offered in support of this claim—first, that the evidence was inadmissible unless qualified by a proper limiting instruction because the Government did not, in its bill of particulars, specify Farinas' conduct in Room 206, and second, that since Farinas' conduct in Room 206 was not considered by the grand jury, it should not be considered by the petit jury.

Farinas' reliance on the notice argument is foreclosed by the requirement that "the deviation between the Government's bill and its proof at trial" be "of substantial prejudice to the defendant," *United States v. Glaze*, 313 F.2d 757, 759 (2d Cir. 1963). Here no such prejudice has been shown. This is not a case in which the Government has held back the name of a victim or key witness, *United States* v. *Glaze, supra;* cf. *United States* v. *Tomasetta,* 429 F.2d 978 (1st Cir. 1970); *United States* v. *Agone;* 302 F.Supp. 1258 (S.D. N.Y. 1969). The difference between the bill and the proof here stemmed from a failure by the Government to designate one room in a building otherwise designated in which an ongoing course of conduct was pursued. Appellant has not claimed that admission of this evidence would in all events have been error, or even that he was surprised by the Room 206 testimony and should have been granted a continuance to prepare a rebuttal to it. Farinas instead contends that a limiting instruction should have been given, explaining to the jury that the Room 206 testimony bore only on Farinas' intent. However, no such instruction was

requested, and in view of the fact that the evidence related to a single continuous course of conduct occurring within a period of an hour, the trial court's failure to give one *sua sponte* was not plain error, Rule 52(a), F.R.Cr.P.

For similar reasons, we reject the assertion that the Room 206 evidence was improperly admitted because Captain Kenny did not mention it in his testimony before the grand jury. Since it was admissible to show intent, the fact that it may not have been presented to the grand jury is immaterial. This case is not one in which the defendant could have been convicted for an offense completely separate from that for which he was indicted, cf. *United States* v. *Agone, supra.* To hold that the Room 206 evidence was inadmissible because not presented to the grand jury would be tantamount to requiring that the Government submit its entire case to that body. We decline to establish such a rule.

A third contention is that Farinas' conviction on Count Four—failure to report for and submit to induction—is invalid because officials at the induction center failed to follow the procedure outlined in AR 601-270 ¶¶37, 40.[2] The argu-

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[2] AR 601-270, ¶¶37, 40:

"37. *Induction.* a. the following procedure will be followed in the induction of all registrants into the Armed Forces:

(1) Registrants who have been determined to be fully qualified for induction in all respects will be assembled. The induction officer will inform them of the imminence of induction, quoting the following:

'You are about to be inducted into the Armed Forces of the United States, in the Army, the Navy, the Air Force, or the Marine Corps, as indicated by the service announced following your name when called. You will take one step forward as your name and service are called and such step will constitute your induction into the Armed Forces indicated.'

(2) Any registrant who fails or refuses to step forward when his name is called will be removed quietly and cour-

ment is unpersuasive on the facts of this case. Farinas was amply warned pursuant to Army Regulation 601-270 that he would be subject to criminal sanctions if he were declared an uncooperative registrant. Moreover, his own conduct, including his statement on August 7, 1968, to Travaglino that he would refuse to serve in the Armed Forces and his statement on August 13, 1968, to Kenny that he would not cooperate with him or anyone else in the induction center, provided a sufficient basis for the inference that he did not intend to take part in the prescribed processing or to submit to induction, and that it would have been a futile gesture to read to him the prescribed governmental form. *United States* v. *Trimm*, 416 F.2d 1145 (2d Cir. 1969); *United States* v. *Meyers*, 410 F.2d 693 (2d Cir.), *cert. denied*, 396 U.S. 835 (1969).

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teously from the presence of the group about to be inducted and processed as prescribed in paragraph 40c."

"40. Processing steps for registrants in special categories . . . .

* * * * *

c. Registrants who refuse to submit to induction. Any registrant who has been removed from the group as prescribed in paragraph 37a(2) and who persists in his refusal to submit to induction will be informed that such refusal constitutes a felony under the provisions of the Universal Military Training and Service Act, as amended. He will be informed further that conviction of such an offense under civil proceedings will subject him to be punished by imprisonment for not more than 5 years, or a fine of not more than $10,000, or both. He will then be informed again of the imminence of induction using the language specified in paragraph 37a(1), and his name and service number again will be called. If he steps forward at this time, he will be informed that he is a member of the Armed Forces concerned, using the language specified in paragraph 37a(3). If, however, he persists in refusing to be inducted, the following action will be taken: [the following material sets forth procedures for taking a signed statement, preparing letters to various authorities, and notifying the United States Attorney.]."

Farinas' allegation that Count Four of the indictment is duplicitous must also be rejected. Although that count alleges conjunctively a refusal to report for and submit to induction, it apprised Farinas with reasonable certainty of the charge against him. Moreover, the procedure of reporting is a continuous one, involving a series of steps from the time of a registrant's arrival at the center until he is asked to step forward, whereupon reporting mergers into induction. A registrant cannot satisfy the obligation to report merely by showing up at the center and then departing before he is processed or taking some other action which prevents his being processed. Here the evidence was sufficient to support a finding that the defendant was guilty as charged, since his statements and conduct justified the inference that he would neither report for nor submit to induction. See *United States* v. *Gutknecht*, 406 F.2d 494, 416 (8th Cir. 1969), *rev'd on other grounds*, 396 U.S. 295 (1970); *Billings* v. *Truesdell*, 321 U.S. 542, 557 (1944).

We have reviewed the other contentions raised by Farinas including his assertions of error in the court's charge to the jury, and his claim that the evidence was insufficient to sustain a conviction on Counts One and Five, and find them to be without merit.

The conviction is affirmed.